Local 72, Laborers' International Union of North America, AFL-CIO *and* Local Union No. 111, Glass, Pottery, Plastics, & Allied Workers International Union, AFL-CIO, CLC *and* Ball Glass Container Group, Ball Corporation. Cases 22-CD-412 and 22-CD-413

16 March 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charges in this Section 10(k) proceeding were filed 2 August 1983 by the Local Union No. 111, Glass, Pottery, Plastics, & Allied Workers International Union, AFL-CIO, CLC (GPPAW), and 16 August 1983 by the Employer, alleging that the Respondent, Local 72, Laborers' International Union of North America, AFL-CIO (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by GPPAW. The hearing was held 12 and 16 September 1983 before Hearing Officer Donna Tribel.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Company, a New Jersey corporation, is engaged in the manufacture and sale of glass containers at its facility in Carteret, New Jersey, where it annually sells products directly outside the State of New Jersey having a value in excess of $50,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and GPPAW are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is engaged at its Carteret plant in the manufacture of glass containers. For major repairs of forehearths and glass furnaces in the plant, the Employer hires outside bricklayers through independent contractors. The Employer pays the wages and fringe benefits of bricklayers and their assistants directly. Laborers have traditionally performed the work of assisting the bricklayers at the Employer's Carteret plant. GPPAW, however, has a clause in its collective-bargaining agreement with the Employer prohibiting subcontracting by the Employer if the work can satisfactorily and more economically be performed by its own employees, represented by GPPAW, provided that the Employer has the facilities and the available trained personnel to perform the work within the required time. During negotiations in February 1983,[1] GPPAW reaffirmed the contract provision giving it jurisdiction over the work of assisting bricklayers with major repairs of forehearths. Laborers Business Agent Gianfrancisco told the Employer in phone conversations during the week of 20 June that the work in dispute belonged to Laborers and that they would picket to get the work assignment. On 25 June, the Employer assigned the disputed work to employees represented by GPPAW. The work was to be completed by 27 June. When Laborers began to picket on the morning of 25 June, the bricklayers refused to cross the picket line. Laborers, GPPAW, and the Employer agreed to a compromise where one employee represented by each Union was assigned the disputed work. The parties agreed that the compromise was not settlement of the dispute and that the matter be taken to the Board.

B. *Work in Dispute*

The disputed work involves helping and tending brick masons; dismantling, demolishing, and removing masonry; and removing debris in the course of repairing forehearths at the Ball Corporation plant, located in Carteret, New Jersey.

C. *Contentions of the Parties*

The Employer and GPPAW contend that there is reasonable cause to believe Laborers violated Section 8(b)(4)(D) of the Act. Both contend that the work in dispute should be awarded to employees represented by GPPAW based on their collective-bargaining agreement; economy, efficiency, and safety of operations; present assignment and employer preference; area and industry practice; ability of employees represented by GPPAW to perform the work; and prior Board determinations involving work similar to that in dispute.

At the hearing, Laborers contended that no jurisdictional dispute exists under *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961). Laborers further contends that no reasonable cause exists to believe it violated Section 8(b)(4)(D) of the Act. It argues that it was only attempting to preserve

[1] All dates herein refer to 1983 unless otherwise noted.

work traditionally performed by employees represented by Laborers. On the merits, Laborers contends that the work in dispute should be awarded to employees represented by it based on its purported collective-bargaining agreement with the Employer; past practice; and skill of employees represented by Laborers.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for voluntary adjustment of the dispute.

As indicated above, it is undisputed that Laborers Business Agent Gianfrancisco told the Employer in phone conversations that Laborers would picket to obtain assignment of the disputed work. The Employer assigned the work to employees represented by GPPAW on 25 June, and Laborers began picketing that same morning. Laborers stopped picketing only after Laborers and GPPAW agreed to a temporary compromise in which one employee represented by each Union would perform the disputed work until the matter could be brought before the Board. Although the work identical to that in dispute had been performed by employees represented by Laborers previously, employees represented by GPPAW were assigned the work in accordance with the terms of the collective-bargaining agreement with the Employer and GPPAW. Under the terms of GPPAW's collective-bargaining agreement with the Employer, the Employer could not subcontract out if the work could be satisfactorily and more economically performed by employees, provided that the Employer had the facilities and available trained personnel to perform the work. Prior to the Employer's assignment of work on 25 June, in previous major rebuilding there were no employees represented by GPPAW available to perform work. In these circumstances, we reject Laborers work preservation defense.[2] Based on the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Furthermore, no party contends and there is no evidence showing that there exists an agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

Neither of the Unions involved herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees. We therefore find that this factor is not helpful to our determination.

It is undisputed that all relevant times GPPAW had a collective-bargaining agreement with the Employer covering the wages and working conditions of all "forming department, machine repair department and production and maintenance employees." The Employer and GPPAW had agreed upon a wage rate for employees with the job classification of "general laborer-maintenance" who performed the same type of work as the work in dispute but not in conjunction with a major rebuild. The agreement between GPPAW and the Employer is sufficient to encompass the work in dispute. The Employer has no collective-bargaining agreement with Laborers. Although the Employer paid fringe benefits in accordance with Laborers collective-bargaining agreement when it utilized laborers in the past, the record indicates that the Employer refused to sign a collective-bargaining agreement with Laborers and never intended that its payment of fringe benefits be considered as entering into a collective-bargaining agreement. We therefore find that the factor of collective-bargaining agreements favors an award of the disputed work to the Employer's employees represented by GPPAW.

2. Employer practice, assignment, and preference

The record indicates that the Employer has previously assigned work similar to that in dispute to employees represented by Laborers. However, as noted above, it did so consistent with its collective-bargaining agreement with GPPAW. Accordingly,

[2] We further reject Laborers contention that no jurisdictional dispute exists under *Safeway*, supra. It is clear that this case does not present the situation in *Safeway* where the employer created the dispute by transferring the work away from the only group claiming the work. GPPAW has contractual claims to the disputed work and a real competing claim with Laborers.

we find the factor of past practice not determinative.

The Employer assigned the work in dispute to employees represented by GPPAW and at the hearing and in its brief expressed its preference that the disputed work be performed by such employees. While we do not afford controlling weight to this factor, we find that it favors an award of the work in dispute to employees represented by GPPAW.

3. Area practice

The Employer presented undisputed evidence that two other area employers use GPPAW-represented employees to perform work similar to that in dispute. However, no evidence was adduced as to the number of other employers in the area performing work similar to that in dispute. We therefore find that the factor of area practice is inconclusive.

4. Relative skills and economy and efficiency of operations

The record discloses that the employees represented by GPPAW possess the skills necessary to perform the work in dispute and are familiar with the safety procedures and physical layout of the plant, resulting in greater efficiency in work. Further, the employees represented by GPPAW can perform a variety of tasks in addition to the work in dispute, thereby resulting in greater economy of operations. In addition, an award of the work in dispute to employees represented by Laborers would result in the Employer paying insurance premiums for employees represented by GPPAW on layoff without getting the benefit of their work.

In contrast, employees represented by Laborers do not have familiarity with the plant and safety rules although they do have the requisite skills and training to perform the work in dispute. At the hearing, Laborers' representative testified that Laborers have the experience and training that makes assisting the bricklayers easier and quicker.

It is clear that the work in dispute involves unskilled labor and can be performed adequately by employees represented by either Union. We, therefore, find that the factor of relative skills does not favor an award of the disputed work to either group of employees. We find, however, that the factor of economy and efficiency of operations favors an award of the disputed work to the Employer's GPPAW-represented employees.

5. Job impact

The record reveals that employees represented by GPPAW who would perform the work in dispute are presently on layoff status. Therefore, an award of the work to employees represented by Laborers would preclude the possibility of these employees being recalled. Thus, we find that the factor of job impact favors an award of the work in dispute to employees represented by GPPAW.

6. Prior cases

The Employer and GPPAW contend that Board determinations in three prior cases favor an award of the work in dispute to employees represented by GPPAW.[3] The cases cited did not involve this employer and involved different facts. Accordingly, this factor is not helpful in our determination.

Conclusions

After considering all the relevant factors, we conclude that employees represented by GPPAW are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's collective-bargaining agreement with GPPAW; employer assignment and preference; economy and efficiency of operations; job impact; and the fact that such employees possess the requisite skills to perform the work in dispute. In making this determination, we are awarding the work to employees represented by GPPAW, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Ball Corporation represented by Local Union No. 111, Glass, Pottery, Plastics, & Allied Workers International Union, AFL-CIO, CLC are entitled to help and tend brick masons, dismantle, demolish, and remove masonry and debris in the course of repairing forehearths at the Ball Corporation plant in Carteret, New Jersey.

2. Local 72, Laborers' International Union of North America, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Ball Corporation to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 72, Laborers' International Union of North America, AFL-CIO shall notify the Regional Director for Region 22 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

[3] *Laborers Local 712 (Midland Glass Co.)*, 197 NLRB 155 (1972); *Laborers Local 132 (Brockway Glass Co.)*, 224 NLRB 117 (1976); *Laborers Local 910 (Brockway Glass Co.)*, 226 NLRB 142 (1976).